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No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

**On Writ Of Certiorari To
The Supreme Court Of Rhode Island**

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property?

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BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

INTERESTS OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998);

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[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, nor persons other than *amicus curiae* contributed financially to the preparation of this brief.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000), when they were before this Court.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

On the back of the rather unexceptional facts of this case, the government seeks to establish a rule of law that would in one fell swoop undo this Court's venerable regulatory takings jurisprudence. The court below, purporting to benignly interpret and apply this Court's holdings in the landmark cases of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), rendered a decision that directly contravenes those decisions and which, if not reversed by this Court, eviscerates the Just Compensation Clause. *See Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (Pet. App. at A-1).

The relevant facts of this case can be summarized as follows. In 1978, petitioner acquired a parcel of land that was subject to the Rhode Island Inter-Tidal Wetlands Protection Act, which regulates the filling of wetlands in coastal wetlands. *Palazzolo*, 746 A.2d at 710, 715 (Pet. App. at A-1). In 1985, petitioner filed for a permit allowing him to fill 18 acres of his land in order to develop a recreational beach facility. *Id.* at 711 (Pet. App. at A-1).

Without a wetland fill permit, he can make no economically beneficial use of his land. Petition for Writ of Certiorari at 18, *Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I. 2000). Nevertheless, in 1986, respondent, the Coastal Resources Management Council ("CRMC") denied petitioner's permit application, whereupon petitioner sought an administrative appeal, which was also denied, and filed suit in state court seeking just compensation for the taking of his property rights in violation of the Fifth Amendment. *Palazzolo*, 746 A.2d at 711 (Pet. App. at A-1) (citing *Palazzolo v. Coastal Resources Management Council*, C.A. No. 86-1496, 1995 WL 941370 (R.I. Super. Jan. 5, 1995) (Pet. App. at A-31)).

In 1997, the state trial court rejected petitioner's claim for just compensation for the taking of his property rights in violation of the Fifth Amendment. *Id.* (Pet. App. at A-1) (citing *Palazzolo v. Coastal Resources Management Council*, No. 88-0297 (R.I. Super. Oct. 24, 1997) (Pet. App. at B-1)). The Supreme Court of Rhode Island affirmed, holding that petitioner could not prevail under the *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *per se* takings test because "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." *Palazzolo*, 746 A.2d at 715-17 (Pet. App. at A-1). The court below further held that petitioner could not establish a partial taking under the *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), test because a property owner, as a matter of law, lacks "reasonable investment-backed expectations" whenever the regulation predates the acquisition of the property. *Palazzolo*, 746 A.2d at 717 (Pet. App. at A-1).

The court below's confusion over the proper role of investment-backed expectations in the context of a categorical regulatory taking case derives from a recent decision of the U.S. Court of Appeals for the Federal Circuit, *Good v. United States*, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000). In *Good*, the court held that:

> For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him. The requirement of investment-backed expectations "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." . . . *Lucas* did not mean to eliminate the requirement for reasonable, investment-backed expectations to establish a taking.

Id. at 1360-61 (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994); citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994)).

Parroting *Good*, the court below likewise held that in this case the petitioner "could not reasonably have expected" that he could develop his land because the mere existence of a regulatory scheme in place at the time he acquired the land barred recovery. This was not a factual conclusion reached as a result of an ad hoc factual inquiry, but rather was a conclusion of law reached because of the existence of the regulatory scheme. *Palazzolo*, 746 A.2d at 717 (citing *Good*, 189 F.3d at 1361-62) (Pet. App. at A-1).

Moreover, the court below further compounded that error by holding that investment-backed expectations were dispositive of both the categorical and partial takings issues: "Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case, and we need not consider the other factors of the *Penn Central* test." *Id.* (citing *Good*, 189 F.3d at 1363).

The case on which the court below relied, *Good v. United States*, has since been severely limited by the Court of Appeals for the Federal Circuit, destroying the underpinnings of the decision below. *See Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *aff'd on rehearing*, No. 99-5030, 2000 WL 1665135 (Fed. Cir. Nov. 3, 2000), *and rehearing en banc denied*, No. 99-5030, 2000 WL 1693725 at *3 (Fed. Cir. Nov. 13, 2000) (Gajarsa, J., dissenting) ("The panel holds that in a categorical regulatory taking, a property owner is entitled to recovery 'without regard to consideration of investment-backed expectations.' ")

As the Federal Circuit did in *Palm Beach Isles*, *amicus curiae* urges this Court to reverse the court below's misreading of this Court's decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Otherwise, a holding that the mere existence of a regulatory regime is an absolute bar to a regulatory taking claim will swallow the Just Compensation Clause since there is virtually no piece of virgin land or property in this country not subject to extensive government regulation and oversight.

ARGUMENT

I. THE FACT THAT THERE ARE REGULATIONS THAT REQUIRE A PROPERTY OWNER TO OBTAIN A PERMIT PRIOR TO USING HIS LAND DOES NOT MEAN, AS A MATTER OF LAW, THAT THE GOVERNMENT'S REFUSAL TO ISSUE A PERMIT IS NOT A TAKING UNDER THE FIFTH AMENDMENT.

A. The Mere Existence of a Regulatory Regime Does Not Entitle the Government To Take All Economically Beneficial Use of Land without Payment of Just Compensation.

In *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *aff'd on rehearing*, No. 99-5030, 2000 WL 1665135 at *6 (Fed. Cir. Nov. 3, 2000), the Federal Circuit rejected the government's argument that investment-backed expectations should be part of a categorical takings analysis. The government sought rehearing on that issue, arguing that the holding was inconsistent with the Federal Circuit decision in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), which, the government argued, held that " 'reasonable investment-backed expectations are elements of every regulatory takings case' even if all economically viable use of the property has been denied." Petition for Rehearing and Petition for Rehearing En Banc at 3, *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000) (quoting *Good*, 189 F.3d at 1361).

In its decision on rehearing in *Palm Beach Isles*, the Federal Circuit made plain that *Good* did not hold that expectations are part of every regulatory takings case,

explaining that *Good* itself did not involve a categorical takings analysis under *Lucas*, a limited class of cases[2]:

> For our purposes, the single most important fact in the [Good] case is that the case did not involve a categorical taking. The trial court expressly found that "[c]ontrary to plaintiff's contention, the ESA [Endangered Species Act, on which the final permit denial by the Corps of Engineers was based] does not require that his property be left in its natural state."[3]

Palm Beach Isles Assocs. v. United States, No. 99-5030, 2000 WL 1665135 at *6 (Fed. Cir. Nov. 3, 2000) (quoting *Good v. United States*, 39 Fed. Cl. 81, 84 (1997)).

In *Palm Beach Isles*, the Federal Circuit also explained why expectations should play no role in a categorical takings analysis:

> A purchaser who pays a substantial price for a parcel can be assumed to have expectations that the parcel can be used for some lawful purpose. When government seizes the entire estate for

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[2] Of course, investment-backed expectations remain an appropriate element of analysis in partial takings cases such as *Good* or *Penn Central*, but this is not such a case; rather, it is a categorical takings case by government in *Lucas*, not *Penn Central* or *Good*.

[3] The Federal Circuit also stated: "Further, the U.S. Fish and Wildlife Service (FWS) restrictions on development imposed pursuant to the ESA do not deprive plaintiff's property of all economic value. The property retains value both for development or for the sale of transferable development rights." *Palm Beach Isles Assocs. v. United States*, No. 99-5030, 2000 WL 1665135 at *6 (Fed. Cir. Nov. 3, 2000) (quoting *Good v. United States*, 39 Fed. Cl. 81, 84 (1997)).

> government purposes, whether by physical occupation or categorical regulatory taking, it is not necessary to explore what those expectations may have been. The purchaser may have had no particular expectations regarding immediate use, but only purchased for long-term investment. Or the purchaser's expectations may have been wholly unrealistic, and she may have paid more than the property is worth. It matters not. The Government is not obligated to pay for her expectations, but only to pay for the property interest taken.

Palm Beach Isles, 2000 WL 1665135 at *9.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court established a bright line test for the narrow class of categorical takings, where the owner was deprived of all economically beneficial use. Drawing upon *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), which stated in dictum that if a zoning ordinance denies the property owner all "economically viable use" of his property then an unconstitutional taking has occurred, the *Lucas* Court plainly did not include investment-backed expectations as part of the categorical takings analysis:[4]

[4] Some have suggested that the categorical rule of *Lucas* might induce a speculative investment in property the purchaser knows cannot be used. *Palm Beach Isles Assocs. v. United States*, No. 99-5030, 2000 WL 1693725 at *6 (Fed. Cir. Nov. 13, 2000) (Gajarsa, J., dissenting). However, if the property had no use at the time of purchase, government action could not cause the loss (or take) of use. Thus, the Just Compensation Clause would not be implemented in the first instance.

> Had the court intended to make analysis of a categorical regulatory taking different from the categorical physical taking, for example regarding the question of investment-backed expectations, surely somewhere in the opinion there would be a hint of it. There is not. The Court well understood that, in takings law involving a "physical" taking of land by the government, the reason the owner acquired the land in the first instance is of no concern that is, the owner's investment-backed expectations, or lack of them, are not a consideration. In light of the Court's repeated juxtaposition of physical takings with "categorical" regulatory takings, and the Court's repeated unqualified statements that the latter deserve the same compensation without more, we can only conclude that the Court's purpose was to convey that principle that, when there is a physical taking of land, or a regulatory taking that constitutes a total wipeout, investment-backed expectations play no role.

Palm Beach Isles, 2000 WL 1665135 at *8; *see also Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) ("The recent Supreme Court decision in *Lucas* . . . teaches that [i]f a regulation categorically prohibits all economically beneficial use of land destroying its economic value for private ownership the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.")

The *Lucas* Court's takings analysis was explicitly grounded on stable "background principles" of property law:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1027, 1029.

The court below erroneously interpreted "background principles of State's law of property" to mean "the regulatory climate that existed when [the landowner] acquired the subject property. . . ." *Palazzolo*, 746 A.2d at 717 (Pet. App. at A-1)). However, this Court actually was referring to the traditional real property law of titles and regulatory schemes that affect use, but generally do not result in a categorical takings. *See Lucas*, 505 U.S. at 1029-31. In so doing, the court below destroyed the delicate balance described so eloquently by Justice Holmes: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The holding below effectively states that all existing regulatory schemes are conclusively presumed to "go too far" as a matter of law, and that the owner has no

remedy under the Constitution because of this "expectation."

However, the right to own and enjoy one's property is one of the fundamental rights on which our system of law is based and is a potent component of the background principles of the States' laws of property. James Madison wrote: "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court explicitly recognized that the Just Compensation Clause helps define a property owner's understanding of his or her rights in property:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.

Id. at 1028 (emphasis supplied).

The historical compact recorded in the Just Compensation Clause is in essence an understanding that government's power will be constrained by principles of fairness. *Armstrong v. United States*, 364 U.S 40 (1960). While a government can, under certain circumstances,

"take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. CONST. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

In this case, the mere existence of a regulatory permitting scheme in place at the time petitioner acquired land neither outright eliminated his ability to use his land nor negated the background principals of property law and the right to just compensation for a taking that is part of every property owner's property estate. Rather, the regulations in place simply required that he obtain a permit to use his land. As this Court has repeatedly held, "mere assertion" of regulatory authority over a parcel of property does not affect an owner's rights under the Just Compensation Clause. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). Moreover, until petitioner applied for and was denied a permit to fill his wetland, his claim for just compensation was not ripe for judicial review. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). *A fortiori*, since petitioner's right to use property was not taken until he was denied a permit, the mere existence of the permitting requirement did not destroy his expectations with respect to use of his property.

Indeed, if the mere existence of regulations affecting the use of land destroyed all right to just compensation under the Fifth Amendment, then this Court would not have been able to state as it did in 1992 that it is an

"extraordinary circumstance when no productive or economically beneficial use of land is permitted. . . ." *Lucas*, 505 U.S. at 1017. In 1992, when this statement was made, there were literally hundreds of thousands of regulations affecting the use of privately owned land in this country that, under the court below's view, would have destroyed any landowner's hope of ever being compensated for the taking of his property rights. Indeed, the government made the argument in the *Lucas* case, and which this Court specifically rejected, that the "regulatory climate" was such that David Lucas should have foreseen the enactment of the Beachfront Management Act pursuant to which he was denied a permit to build his two proposed houses. *Id.* at 1028 ("[W]e think that the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the state may subsequently eliminate all economically viable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.").

Finally, the court below made much of the fact that "[petitioner] was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property *after* the regulation became effective." *Palazzolo*, 746 A.2d at 716 (Pet. App. at A-1) (emphasis in original). However, there are numerous decisions where courts have held that the existence of even a strict regulatory regime concerning the use of private property does not preclude a court from finding that a property owner reasonably expects to exercise the right to use its property. For example, in *Maritrans, Inc. v. United States*, 40 Fed. Cl. 790, 790-92 (1998), the owner of a fleet of oil barges sought just

compensation because of a regulation requiring transformation of its single-hulled vessels into double-hulled vessels. The government argued that the plaintiff had no reasonable investment-backed expectations regarding the use of its ships because the maritime industry is pervasively or heavily regulated. *Id.* at 794. The court pointed out that there are several industries subject to heavy regulation, such as the banking industry, in which takings claims have been considered, but held that "we are not aware of a blanket no-takings rule with respect to regulated industries; or that one may never prevail on a takings claim if participating in a heavily regulated industry." *Id.* at 797. Moreover, the court specifically rejected the government's argument, stating that "[m]ere participation in a regulated industry does not preclude a finding that a compensable taking has occurred." *Id.* at 801.

Indeed, land use is the quintessential "heavily regulated industry" because zoning has been in effect in most cities for many decades. Yet this Court has never suggested that the mere existence of a zoning regulatory scheme is an absolute bar to a taking claim. To the contrary, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), a coastal zoning permitting scheme was in place when the Nollans decided to replace their beachfront home. Furthermore, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), floodplain zoning was in place when the First English Church was denied the right temporarily to rebuild. Similarly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a building permit requirement was in place when Florence Dolan was denied a permit that she later

claimed was an unconstitutional exaction. Finally, zoning and subdivision requirements were in place when a property owner was denied a permit in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In none of these cases did this Court even suggest that the mere existence of zoning laws defeated a takings claim. Nor did the Court consider whether the zoning scheme (as compared with the particular permit condition or land use limitation) was or was not in effect at the time of purchase. Indeed, in *Nollan*, this Court explicitly rejected this argument:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan, 483 U.S. at 833-34 n.2.

Similarly, the petitioner in this case reasonably expected that he would be able to use his property to construct a residential development despite the existence of the Rhode Island Inter-Tidal Wetlands Protection Act. The mere fact that the property's use was regulated does not preclude a finding that a compensable taking has occurred.

B. The Mere Existence of a "Regulatory Climate" Does Not Dispose of the Takings Issue in a Partial Takings Case.

Citing the Federal Circuit's decision in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000), the court below also rejected petitioner's partial taking claim for relief on the ground that petitioner's expectation that he could use his property was unreasonable as a matter of law because "there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development." *Palazzolo*, 746 A.2d at 717 (Pet. App. at A-1). The court below further misapplied the rule of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), which requires that a court "engag[e] in . . . essentially ad hoc factual inquiries." The Court in *Penn Central* identified three factors commonly considered in the course of these ad hoc inquiries: "[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations [and] . . . the character of the governmental action." *Id.* (citations omitted). This Court has never held, nor should it, that a "reasonable expectations" factor eliminates the need to examine the facts of the particular case, and can serve as an absolute bar to a partial takings claim.

Moreover, the Federal Circuit Court of Appeals in *Palm Beach Isles* has rejected the court below's erroneous reading of *Good* on this issue of partial takings:

> The existence of a regulatory regime does not per se preclude all investment-backed expectations for development. The difficulty with the third point is that it involves a disputed question of fact – what uses are left for the tract after the permit denial – and the case was decided on summary judgment.

Palm Beach Isles, 2000 WL 1665135 at *11; *see also Hodel v. Irving*, 481 U.S. 704 (1987) (finding taking of right to devise unconstitutional even though potential heirs certainly had no particular expectation regarding inheritance); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), (holding the owner of the principal entitled to just compensation for the taking of his interest even though he had no expectation that he would ever earn any interest on his money).

Indeed, even if petitioner in this case, as a matter of fact, could not establish that his expectations were reasonable with respect to use of his property, there is no basis whatsoever for this Court establishing that, as a matter of law, no property owner can have reasonable expectations to use his or her property if there is a regulatory regime in place. For example, since 1972, there has been a federal wetlands regulatory regime in effect for the entire United States, affecting millions of landowners and many millions of acres of private land. *See* Water Pollution Prevention and Control Act, 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 2000); *see also* Michael Grunwald, *Working to Please Hill Commanders*, THE WASHINGTON POST at A1 (Sept. 11, 2000) ("The [Corps] controls 12,000 miles of waterways, 8,500 miles of levees, 4,400 recreation sites, 300 deep-draft ports everyone in someone's district, someone's state."). Under the federal wetlands regulatory program, land deemed jurisdictional wetland cannot be filled (that is to say, used by the property owner) without

a Section 404 wetland permit. 33 U.S.C. § 1344 (1986 & Supp. 2000). However, the mere fact that a property owner must obtain a permit does not mean he or she has no expectations that the property cannot be used, since more than 95% of all Section 404 permits applications are granted each year. *See* <http://www.epa.gov/owow/wetlands/facts/fact18.html> (attached as Exhibit A).

Not only does the mere enactment of a regulatory regime not preclude a finding that a property owner can reasonably expect to use his land, but the administration of the regulatory regime may even contribute to the property owner's expectations. For example, information from the U.S. Army Corps of Engineers' Regulatory Branch in Washington, D.C. indicates that, from fiscal year 1994 to 1998, of the 44,249 Section 404 individual permit applications the Corps of Engineers received, only 1,186 were denied. *See* U.S. Army Corps of Engineers, Regulatory Branch, Section 404 and Section 10/404 Permit Activities (hereinafter "Corps Permit Activities Table") (attached as Exhibit B); *see also* <http://www.epa.gov/owow/wetlands/facts/fact5.html> (attached as Exhibit C). Those statistics evidence a Corps permitting trend that can be traced back at least as far as 1980. Between fiscal years 1980 and 1985, approximately 43,750 of the 55,565 individual permit applications received were approved and only 1,945 were denied. *See* Corps Permit Activities Table (attached as Exhibit B). Moreover, the U.S. Army Corps of Engineers statistics indicate that only 2,340 of the 54,900 individual permit applications received between fiscal years 1985 and 1990 were denied. *Id.* Remarkably, the Environmental Protection Agency has vetoed only eleven permit application approvals in the entire history of the

Corps of Engineers' administration of the permit program. *See* <http://www.epa.gov/owow/wetlands/facts/fact5.html> (attached as Exhibit C). It has been reported that even last year the Corps "denied less than half as many applications to fill wetlands as it did in 1992." *See* Michael Grunwald, *For Oil Projects, Corps' Answer Is Almost Always "Yes"*, THE WASHINGTON POST at A1 (Sept. 13, 2000) ("A review of the [Corps'] work in Alaska and around the country shows that its $117 million regulatory program is mostly just a permitting program, allowing well over 99 percent of developers' requests to drain, dredge and fill wetlands . . . ").

In light of these statistics regarding just one federal program, a constitutional holding that a property owner cannot reasonably expect to use his or her land simply because it is subject to a permitting scheme is unwarranted.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* urges this Court to reverse the decision below.

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U.S. ARMY CORPS OF ENGINEERS
REGULATORY BRANCH
SECTION 404 AND 10/404
PERMIT ACTIVITIES

Section 404 and Sections 10/404	1985	1986	1987	1988	1989	1990
Individual Permit Applications Received[1]	8,400	8700	8600	11,100	8600	9500
Individual Permits Issued[2]	5,200	5800	5200	5200	5000	4800
Individual Permits Denied	365	385	390	380	380	440
Individual Permits Withdrawn	1,700	1990	2300	4800	3800	4000
General Permits Authorized	139,600	119,500	133,100	2600	28400	30300

[1]Applications received during the fiscal year.
[2]Includes Letter Permits

U.S. ARMY CORPS OF ENGINEERS
REGULATORY BRANCH
SECTION 404 AND 10/404
PERMIT ACTIVITIES

Section 404 and Sections 10/404	1994	1995	1996	1997	1998
Individual Permit Applications Received[1]	9080	8923	9115	8095	9036
Individual Permits Issued[2]	4134	4693	5028	4755	4931
Individual Permits Denied	358	284	219	167	158
Individual Permits Withdrawn	4184	5093	4117	4100	3841
General Permits Authorized	39619	51672	55268	60219	64520

[1]Applications received during the fiscal year.
[2]Includes Letter Permits

U.S. ARMY CORPS OF ENGINEERS
REGULATORY BRANCH
SECTION 404 AND 10/404
PERMIT ACTIVITIES

Section 404 and Sections 10/404	1980	1981	1982	1983	1984	1985
Individual Permit Applications Received[1]	10,000	11,000	9,600	8,435	8,130	8,400
Individual Permits Issued[2]	8,000	8,550	9,000	7,000	6,000	5,200
Individual Permits Denied	250	290	320	370	350	365
Individual Permits Withdrawn	1,800	1,500	2,000	1,900	1,400	1,700
General Permits Authorized	17,000	20,500	54,000	85,000	92,400	139,600

[1]Applications received during the fiscal year.
[2]Includes Letter Permits

U.S. Environmental Protection Agency

What About Takings?

The Issue: When does a government action affecting private property amount to a "taking," and what are the takings implications of wetland regulation?

The Fifth Amendment to the Constitution of the United States of America

No person shall . . . be deprived of . . . property without due process of law, nor shall private property be taken for public use, without just compensation.

Legal Background

The concept of takings comes from the Fifth Amendment (see box below), which prohibits the taking of private property by the government for a public use without payment of just compensation. This fact sheet briefly explores the issue of takings as it relates to wetlands regulation.

The Supreme Court and lower courts have established a body of law used to determine when government actions affecting use of private property amount to a "taking" of the property by the government. When private property is "taken" by the government, the property owner must be fairly compensated.

Initially, the courts recognized takings claims based on government actions that resulted in a physical seizure or occupation of private property. The courts subsequently ruled that, in certain limited circumstances, government regulation affecting private property also may amount to a taking.

In reviewing these "regulatory" takings cases, the courts generally apply a balancing test; they examine the character of the government's action and its effect on the property's economic value. Government actions for the purpose of protecting public health and safety, including many types of actions for environmental protection, generally will not constitute takings. The courts also look at the extent to which the government's action interferes with the reasonable, investment-backed expectations of the property owner.

In Lucas v. South Carolina Coastal Council (1992), the U.S. Supreme Court ruled that a State regulation that deprives a property owner of all economically beneficial use of that property can be a taking. The court further clarified, however, that a regulation is not a taking if it is consistent with "restrictions that background principles of the State's law of property and nuisance already placed upon ownership." As an example of "background principles," the court referred to the right of government to prevent flooding of others' property.

Dolan v. City of Tigard (1994), a more recent Supreme Court takings case, involved a requirement by the City of Tigard in Oregon that, to prevent flooding and traffic congestion, a business owner seeking to expand substantially onto property adjacent to a floodplain create a

public greenway and bike path from private land. The Supreme Court ruled that the City's requirement would be a taking if the City did not show that there was a Areasonable relationship@ between the creation of the greenway and bike path and the impact of the development. As compared to the facts in Dolan, the Clean Water Act Section 404 program generally does not require property owners to provide public access across or along their property.

Current Status

The presence of wetlands does not mean that a property owner cannot undertake any activity on the property. In fact, wetlands regulation under Section 404 does not necessarily even result in restricting the use of a site. Many activities are either not regulated at all, explicitly exempted from regulation, or authorized under general permits.

Moreover, in situations where individual permits are required, the Federal agencies can work with permit applicants to design projects that meet the requirements of the law and protect the environment and public safety, while accomplishing the legitimate individual objectives and protecting the property rights of the applicant. Overall, more than 95% of all projects receive Section 404 authorization.

Wetlands Division homepage

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Environmental Protection Agency's Office of Wetlands, Oceans, Watersheds

URL: http://www.epa.gov/owow/wetlands/facts/fact18.html

Revised May 25, 1999

U.S. Environmental Protection Agency

Facts about Wetlands

Over half (53) of the wetlands in the lower 48 States were lost between the late 1700s and the mid-1980s. About 100 million acres of wetlands remain today in the lower 48 States, representing less than 5% of the land mass in the continental United States.(See map.)

Source:Dahl and Johnson. Status and Trends of Wetlands in the Conterminous United States. USFWS, 1989.

Twenty-two States have lost at least 50% of their original wetlands. Seven of those twenty-two States – California, Illinois, Indiana, Iowa, Missouri, Kentucky, and Ohio – have lost more than 80% of their original wetlands. Source: Mitch and Gosselink. Wetlands. 2nd edition. Van Nostrand Reinhold, 1993.



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From the mid-1970s to the mid-1980s, wetlands were lost at an annual rate of 290,000 acres per year. Source: Dahl and Johnson. Status and Trends of Wetlands in the Conterminous United States, mid-1970's to mid-1980's. USFWS, 1991.

In Fiscal Year 1994, over 48,000 people applied to the Army Corps of Engineers (Corps) for a Section 404 permit. Eighty-two percent of these applications were covered by general permits in an average time of 16 days. Less than ten percent of the applications were subject to the more detailed individual evaluation – which took an average of 127 days. Only 358, or 0.7 percent, of the permits were denied. In the 22-year history of the Section 404 program, EPA has vetoed only 11 permits.

In short, almost all individuals who applied for a Section 404 permit in 1994 got their permits, and the average time for a decision was 27 days.

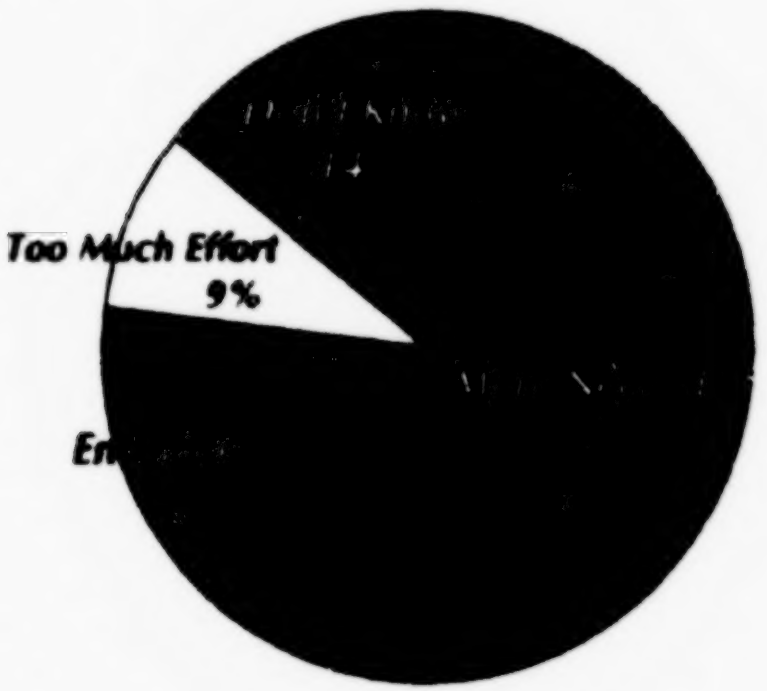
In addition, general permits cover an estimated 50,000 activities that do not require the public to notify the Corps at all.

Source: U.S. Army Corps of Engineers, U.S. Environmental Protection Agency.

Is Current Wetlands Protection Adequate?

In a 1994 survey, 53% of the respondents said they felt that more wetlands protection efforts were needed, 24% said current efforts struck the right balance, 9% said these efforts had gone too far, and 14% said they didn't know.

Source: "Times Mirror Magazines National Environmental Forum Survey." 1994. Times Mirror Magazines/Roper Starch.



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Environmental Protection Agency's Office of Wetlands, Oceans, Watersheds

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URL: http://www.epa.gov/owow/wetlands/facts/fact5.html

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